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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEVIN DEDRIC DUCKWORTH, Defendant and Appellant.	E048347 (Super.Ct.No. FVI702335) OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam I. Morton, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Following a probation revocation hearing, the trial court found defendant to be in violation of two of his Proposition 36[1] probation conditions. The court revoked and then reinstated defendant's probation on the same terms and conditions as previously ordered. Defendant's sole contention on appeal is that the trial court abused its discretion when it found him in violation of his probation. We find no abuse, and will affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On October 14, 2007, San Bernardino County Sheriff's Deputy Moler contacted the manager of a restaurant regarding two subjects failing to pay their bill. The manager reported that he believed the suspects were still in the restaurant's parking lot, sitting in their vehicle. When the deputy approached the vehicle, he smelled a strong odor of marijuana coming from the vehicle. Defendant and a female occupant were sitting in the backseat of the vehicle.

The deputy detained defendant, and during a subsequent search of the vehicle, found marijuana, Oxycodone, and Vicodin. After defendant waived his constitutional rights, he admitted the marijuana was his, but he denied ownership of the pills. Defendant also acknowledged that he did not have a prescription for either narcotic. Defendant was arrested and subsequently charged with two counts of possession of a controlled substance, to wit, Hydrocodone and Oxycodone (Health & Saf. Code, § 11350,

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[1] The Substance Abuse and Crime Prevention Act of 2000 (Proposition 36 or The Act).

[2] The underlying factual background is taken from the police officer's report.

subd. (a)) (counts 1 & 2) and possession of marijuana (Health & Saf. Code, § 11357, subd. (b)) (count 3).

On January 17, 2008, defendant pled guilty to count 1, possession of Hydrocodone. In return, the remaining counts were dismissed, and the court granted defendant deferred entry of judgment pursuant to Penal Code section 1000 and allowed him to enroll in a drug diversion program.

Approximately seven months later, on August 28, 2008, the court terminated defendant's diversion and reinstated criminal proceedings because defendant failed to show proof of enrollment in a drug diversion program.

On September 26, 2008, defendant's motion for Proposition 36 probation pursuant to Penal Code section 1210.1 was granted, and the matter was referred to the probation department for a presentence report.

Defendant was sentenced on October 31, 2008. At that time, defendant was formally placed on three years' Proposition 36 probation on various terms and conditions. Among his terms and conditions, defendant was required to (1) cooperate with the probation officer in a plan of rehabilitation and follow all reasonable directives of the probation officer (term No. 3); and (2) attend Narcotics Anonymous (NA)/Alcoholics Anonymous three times a week and show proof of attendance to the probation officer upon request (term No. 20).

On December 9, 2008, the probation department filed a Penal Code section 1210.1 progress review memorandum. The memorandum indicated that defendant was not in compliance with his probation because he had failed to enroll in a drug treatment

program at "Prototypes Community Assessment Service Center" (Prototypes). The probation officer, therefore, recommended that the court find defendant in violation of his probation for the first time pursuant to Penal Code section 1210.1, subdivision (f)(3)(A).

The hearing on the probation violation was held on January 29, 2009. At that time, defense counsel informed the court that he had proof that defendant had attended NA meetings through January, and that defendant was scheduled to be enrolled with the Prototypes program the following day. The court ordered defendant to report to probation that day, and also ordered defendant to come to court on February 5, 2009, with proof of his NA meetings for that week and proof he had attended his appointment at Prototypes. The court did not find defendant to be in violation of his probation, but admonished defendant several times to stay in contact with the probation department and to provide the probation department with his current contact information.

On March 3, 2009, the probation department filed another Penal Code section 1210.1 progress review memorandum. The probation officer noted, "Though [defendant] has enrolled in treatment and has fulfilled his requirement to register as a drug offender, he is not in compliance with the orders of the court or cooperative with the directives of the probation department regarding submission of necessary documentation for Proposition 36 drug treatment." The probation officer further indicated that defendant was in violation of terms Nos. 3 and 20 of his probation, and recommended that the court find defendant in violation of his probation for the first time pursuant to Penal Code section 1210.1, subdivision (f)(3)(A).

On March 5, 2009, defendant denied the violations and requested a formal probation revocation hearing pursuant to *People v. Vickers* (1972) 8 Cal.3d 451.

The *Vickers* hearing was held on March 19, 2009. Defendant's probation officer (Farmer) testified that defendant had failed to stay in contact with her and that the last time she had contact with defendant was on February 5, 2009, when defendant provided her with proof of his NA meetings. Defendant failed to go to the probation department on March 5, 2009, after his court date.

Farmer also stated that she had directed defendant, as she does with all her clients, to submit verification of his NA meetings 10 days prior to the court hearing. She further explained that when the probation office receives such a fax, a clerk generally date-stamps the fax transmissions and then places them into a "box for distribution." Farmer testified she checks her "box" daily. As of writing the second memorandum on February 26, 2009, defendant had not submitted proof of attending his NA meetings. Farmer testified that she had received two separate fax transmissions from defendant: one was date-stamped March 2, 2009, documenting his proof of attendance for the period from February 5 to February 25; and the second was date-stamped March 16, 2009, documenting his attendance for the period from February 5 to March 12. Farmer acknowledged that defendant had submitted some of the verifications in person. When asked if her office ever had problems receiving fax transmissions, Farmer testified that there had been problems in the past. She also admitted that the 10-day rule is a "personal" directive and not a formal requirement of the probation department. Despite the fact that defendant had faxed the verifications on March 2 and March 16, Farmer still

believed defendant was not in compliance with his probation terms. She explained, ". . . because he's not following the directives that I gave him nor the directions that his terms and conditions state. His terms and conditions say that he is supposed to submit proof of his meeting attendance to the probation officer, and I don't tend to get them until after court except for these."

Defendant testified that Farmer was his probation officer and that he last saw her in her office on March 5, 2009. At that time, Farmer acknowledged to him that she had received the first fax he sent to her. In addition, Farmer told him to have his verifications in by Monday, March 9. However, because he had his NA classes on Tuesday, Wednesday, and Thursday, he waited to send the verifications until the following week, March 16. Defendant claimed Farmer never told him she needed the verifications 10 days prior to his court dates. She merely stated that she needed them *before* his court date or *before* she sends in her memorandum.

Following arguments from counsel, the trial court found by a preponderance of the evidence that defendant had violated his probation under Proposition 36. The court explained, "[Defendant], you got the benefit of the doubt last time when you didn't enroll in the classes you were supposed to enroll in or you enrolled late. You didn't bring proof and then you brought proof to the court. And I told you at that hearing, and I recall that hearing, and I told you that the Court appreciates that you've done it and you need to stay on it and it's good that you're in your program and good that you're going to your classes. But part of the deal is you have to say in touch with probation and you have to make sure probation sees it all. It's not enough to do it and bring it to court. And I

remember telling you that, not in those exact words, but probably pretty close to those exact words, that, yep, you're doing the program and that's why we didn't violate you. But we made it very clear and you were very early in the program. You just started the program. We made it very clear that, especially in a case like PROP 36, that you have to stay in regular contact with your probation officer and you have to make sure you're crossing all your 'T's and dotting all your 'I's, and you didn't do it.

"And, again, you're doing your program, yeah, and you're going to your classes. And for you, for your life, that's what's going to be the most important. But if you're not making sure your probation officer sees it, then you're in violation. Ultimately you're going to go to prison behind this, not because you're still using drugs or not doing the program, the treatment program I mean, but because you're not following all the rules. And it's a program where you have to follow all the rules.

"And so what I'm saying is that I am finding by preponderance of the evidence . . . that you violated for the first time. And this is a first violation of your PROP 36 program.

"And I'm going to tell you, you need to make sure that you are in court on time. You need to make sure that you understand what it is Ms. Farmer wants from you. If you have a question, you need to ask her. If she's not answering the question, you need to come to court and say, 'You know what, this is unclear to me.' Come talk to Mr. Mendoza [defense counsel]. Let him talk to her. Make sure you know what's going on. She wants all your NA meetings and all of your information at least 10 days before court. Make sure she has it at least 10 days before court. If you are not hand delivering it and getting a copy stamped saying that 'I hand delivered it,' if you want to send it in by fax, if

you want to mail it in, whatever your arrangements are, you better be on the phone 10, 11, 12 days before, make sure she got it so that you have an opportunity to make sure she got it so you can bring it in if she didn't get it."

The court, thereafter, revoked defendant's probation and then reinstated it on the original terms and conditions. This appeal followed.

II

DISCUSSION

Defendant contends the trial court abused its discretion when it found he was in violation of his Proposition 36 probation because the probation officer's requirement that he provide proof of his attendance at NA meetings at least 10 days prior to any court hearing was not actually a condition of his probation. He also claims that even if the 10-day reporting requirement was a condition of his probation, his violation of that condition was not knowing and willful.

Proposition 36 was approved by the voters on November 7, 2000. It took effect on July 1, 2001, and is codified in Penal Code sections 1210, 1210.1, 3063.1, and Health and Safety Code section 11999.4 et seq.[3] The stated purpose and intent of Proposition 36 was to "divert from incarceration into community-based substance abuse treatment programs

[3] Penal Code sections 1210 and 1210.1 have been amended numerous times, including an amendment by Senate Bill No. 1137 (2005-2006 Reg. Sess.) (Stats. 2006, ch. 63, §§ 1-12), signed by the Governor on July 12, 2006. References to statutes originating in Proposition 36 are to those as they appeared prior to the amendments made by Senate Bill No. 1137. In *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, Senate Bill No. 1137 was held unconstitutional and invalid. Defendant does not challenge the amendments to Senate Bill No. 1137 in this appeal.

nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses; [¶] . . . [t]o halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration and reincarceration of nonviolent drug users who would be better served by community-based treatment." (Prop. 36, § 3; see also Pen. Code, § 1210.)

Under Proposition 36, the first and second time the state moves for revocation of probation, and it is established that the defendant has violated a drug-related condition of probation, he is entitled to be returned to probation unless the prosecution proves by a preponderance of the evidence that he poses a danger to others. (§ 1210.1, subd. (f)(3)(A) & (B); *People v. Tanner* (2005) 129 Cal.App.4th 223, 235 (*Tanner*).) However, the third time the state moves for revocation of probation and it is established at a hearing that the defendant has violated a drug-related condition of probation, the defendant is no longer eligible for probation. (§ 1210.1, subd. (f)(3)(C); *Tanner*, at pp. 235-236.)

Compliance with due process is "required for revocation of probation under the Act. The prosecution has the burden of producing evidence and the burden of persuasion showing a probation violation under the Act occurred by a preponderance of the evidence." (*Tanner, supra,* 129 Cal.App.4th at p. 234.)

In *People v. Buford* (1974) 42 Cal.App.3d 975 (*Buford*), the court stated: "The superior court may revoke probation in the interests of justice if it has reason to believe that the probationer has committed another offense or otherwise violated the terms of his probation. (Pen. Code, § 1203.2, subd. (a).) The court having expressly declined to

consider any evidence of the subsequent offense, its decision to revoke must have been predicated upon a determination that appellant had otherwise violated the terms of his probation. Although the grounds for revocation need not be established beyond a reasonable doubt, they must be clearly and satisfactorily shown. [Citation.] Revocation rests in the sound discretion of the court. Although that discretion is very broad, the court may not act arbitrarily or capriciously; its determination must be based upon the facts before it. [Citations.]" (*Id*. at p. 985.)

Based on the evidence presented, and the trial court's thorough consideration of the evidence below, we cannot say that the trial court abused its discretion in finding that defendant violated the terms of his probation. Initially, we note, contrary to defendant's argument and as the court below explained, the 10-day rule was a *reasonable directive* of defendant's probation officer, rather than, as defendant appears to suggest, a condition of his probation.

In *People v. Kwizera* (2000) 78 Cal.App.4th 1238, the appellate court considered the validity of a probation condition that required the probationer to "'[f]ollow such course of conduct as the probation officer prescribe[s].'" The court noted that "by statute, the court sets conditions of probation and the probation officer supervises compliance with the conditions." The court concluded that the challenged probation condition was "reasonable and necessary" to enable the probation department to supervise compliance with the other specified conditions of probation, such as by allowing the probation officer to set the time and place for drug testing or reporting. In so holding, the court emphasized that the probation department could not use its authority

to impose unreasonable or irrational conditions not related to those authorized by the trial court. (*Id*. at pp. 1240-1241.)

Here, defendant was required to "[c]ooperate with the probation officer in a plan of rehabilitation and follow all reasonable directives of the probation officer." The 10-day directive of the probation officer was reasonable if the probation officer hoped to develop and supervise a viable plan for defendant's rehabilitation, evaluate his progress, and prepare reports communicating his progress to the court prior to any hearings. In fact, defendant did not dispute that he was required to provide documentation of his attendance before his court hearing was held. Moreover, the court's statements of reasons demonstrates it found defendant in violation of his probation terms for failing to follow the reasonable directives of his probation officer.

Defendant argues that the trial court did abuse its discretion because, even if the 10-day reporting requirement was a condition of his probation, he did not willfully violate that condition. We disagree.

In *Buford*, *supra*, 42 Cal.App.3d 975, the court found that the trial court abused its discretion in revoking probation because the finding was not supported by substantial evidence. (*Id*. at pp. 984-985.) The court stated, "The superior court may revoke probation in the interests of justice if it has reason to believe that the probationer has committed another offense or otherwise violated the terms of his probation. (Pen. Code, § 1203.2, subd. (a).) . . . Although the grounds for revocation need not be established beyond a reasonable doubt, they must be clearly and satisfactorily shown. [Citation.] Revocation rests in the sound discretion of the court. Although that discretion is very

broad, the court may not act arbitrarily or capriciously; its determination must be based upon the facts before it. [Citations.]" (*Buford*, at p. 985.)

We agree with this analysis in *Buford* and, under that analysis, we discern no abuse of discretion. What is absent in *Buford* is support for defendant's contention that the evidence must show that defendant willfully violated his probation under Proposition 36. There is no mention in *Buford* regarding the "willfulness" standard.

In *In re Jerry R.* (1994) 29 Cal.App.4th 1432, the court stated that "[o]n occasion, . . . a statute prohibits the 'willful' commission of an act." (*Id*. at p. 1438.) The court then defined "'willful'" or "'willfully'" in a penal context. (*Ibid*.) The case, however, does not stand for the proposition that the evidence must prove a willful violation of a probation condition, as argued by defendant. Under the statute applicable in this case, [Penal Code] section 1210.1, there is nothing in the language of the statute that requires a willful violation of probation. The statue simply requires that defendant violate probation.

Nonetheless, even if we were to apply the "willfulness" standard, we would still find that defendant willfully violated the terms of his probation. In criminal law, willfulness requires "'simply a purpose or willingness to commit the act . . . ,' without regard to motive, intent to injure, or knowledge of the act's prohibited character. [Citation.] The terms imply that the person knows what he is doing, intends to do what he is doing, and is a free agent. [Citation.] Stated another way, the term 'willful' requires only that the prohibited act occur intentionally. [Citations.]" (*In re Jerry R.*, *supra*, 29 Cal.App.4th at p. 1438.)

In this case, defendant knew to keep in contact with his probation officer and follow all reasonable directives of his probation officer. Defendant, however, failed to comply with them. Nonetheless, defendant contends that he was in "compliance with the reporting requirement from his probation terms." Defendant appears to argue that his probation was violated merely for failing to adhere to the 10-day reporting requirement, and the failure to report at least 10 days prior to court was not willful. There is, however, nothing in the record to suggest that the trial court, or this court, has regarded the alleged violation in such a stringently narrow fashion. The issue is not whether defendant complied with the reporting requirement, but whether he followed the reasonable directives of his probation officer, which includes the 10-day reporting requirement. Defendant had ample opportunity to comply, but he intentionally chose not to. Defendant's own testimony shows that he willingly failed to follow the reasonable reporting directives of his probation officer. The evidence was more than sufficient to show that although defendant made some effort to comply, he delayed his efforts and at the end, due to his lack of effort, he was unable to comply with the terms of his probation, namely follow all reasonable directives of his probation officer. Because defendant knew what he was doing, and intended to do what he was doing, his actions were willful. (See *In re Jerry R.*, *supra*, 29 Cal.App.4th at p. 1438.)

Defendant relies on *People v. Galvan* (2007) 155 Cal.App.4th 978 and *People v. Zaring* (1992) 8 Cal.App.4th 362 (*Zaring*). Neither *Galvan* nor *Zaring* aid defendant. In *Galvan*, the defendant was placed on probation and ordered to report to the probation office within 24 hours of his release from custody. He was also ordered to report to the

probation office within 24 hours of his reentry into the United States if he left the country. The defendant did not appear for a probation violation hearing because he had been deported to Mexico immediately after his release from jail. There was no evidence in the record to show when he had returned to the United States. The Court of Appeal, therefore, determined that the evidence was insufficient to show that he willfully failed to comply with the reporting requirements. (*Galvan*, at pp. 980-984.)

Galvan, in turn, had relied on *Zaring*, *supra*, 8 Cal.App.4th 362. In *Zaring*, the trial court had ordered the defendant to appear in court the following day at 8:30 a.m. The next day, the defendant was 22 minutes late. At her probation revocation hearing, the defendant explained that she had arranged for a ride to court (she lived 35 miles away), but that the ride fell through at the last minute because of a childcare problem. (*Id*. at pp. 365-366, 376-377.)

The Court of Appeal in *Zaring* held that the trial court had abused its discretion in revoking probation. It determined that the defendant's violation had not been willful: "Certainly, it cannot reasonably be concluded that Judge Broadman expected the appellant to 'camp' outside the courtroom until 8:30 in the morning. Neither can it reasonably be concluded that had appellant had an accident or mechanical failure of her vehicle that such conduct would not be excusable. In other words, the discretion that the trial court is empowered to use is predicated upon reason and law but is primarily directed to the necessary end of justice. . . . [¶] . . . [¶] . . . [A]ppellant was confronted with a last minute unforeseen circumstance as well as a parental responsibility common to virtually every family. Nothing in the record supports the conclusion that her conduct

was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court. . . . [W]e cannot in good conscience find the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a willful violation of that condition." (*Zaring*, *supra*, 8 Cal.App.4th at pp. 378-379, fns. omitted.)

The instant case is significantly different from both *Galvan* and *Zaring*. Unlike *Galvan*, there is evidence here to show that defendant was aware of his probation officer's reasonable directives, specifically the 10-day reporting requirement, and was capable of abiding by that directive but failed to do so. Thus, in contrast to *Zaring*, here, we may conclude that defendant's failure to fulfill the terms of his probation was "the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court." (*Zaring*, *supra*, 8 Cal.App.4th at p. 379.)

Moreover, we note that although the trial court found that defendant violated the terms of his probation, in consideration for defendant's efforts, the court did not sentence defendant; but, instead, it reinstated his probation under the original terms and conditions.

Based on the above, we hold that the trial court did not abuse its discretion in finding that defendant violated the terms of his probation.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.